

**United States Department of Labor
Employees' Compensation Appeals Board**

BOYD K. NOTTEBROCK, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Clarita, CA, Employer**

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**Docket No. 05-1595
Issued: October 18, 2005**

Appearances:
Boyd K. Nottebrock, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 2, 2005 merit decision, denying his claim for an injury to his left shoulder and back, and a June 29, 2005 decision, denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these merit and nonmerit decisions.¹

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an employment-related left shoulder or back injury; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

¹ The record contains an August 1, 2005 Office decision affirming the May 2, 2005 decision. Appellant filed his appeal with the Board on July 25, 2005 and under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's August 1, 2005 decision, issued while the Board had jurisdiction over the matter in dispute, is null and void. See *Linda Thompson*, 51 ECAB 694 (2000).

FACTUAL HISTORY

On February 17, 2005 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that he sustained employment-related left shoulder and lower back injuries. Regarding the relationship of the claimed injuries to his employment, appellant stated: "Injury occurred on job while working out of and on company vehicle and product." Appellant first became aware of his condition on January 11, 2005 and first realized it was caused or aggravated by his employment on January 17, 2005. In an attached statement, he indicated that on about January 3 or 4, 2005 he "pulled/strained left shoulder" and that on about January 11, 2005 he "pulled muscle/pinched nerve in lower back." Appellant stopped work on February 12, 2005.

Appellant submitted a February 15, 2005 form report in which Dr. Lakhbinder P. Dhanda, an attending Board-certified internist, listed the date of injury as approximately January 10, 2005 and the mechanism of injury as "lifting -- twisting out of nonreg[ulation] vehicle." Dr. Dhanda listed an illegible "diagnosis due to injury" and provided work restrictions.

By letter dated March 2, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim. The Office asked appellant to clarify which particular employment activity or activities he felt caused or contributed to his claimed injuries.

Appellant submitted a March 16, 2005 statement in which he indicated that he initially had misconceptions about the difference between an occupational disease and a traumatic injury. He wished to clarify his earlier statements and asserted that on January 3 or 4, 2005 he strained his left shoulder and that on January 12, 2005 he strained his lower back at work. Appellant indicated that his back "went out" on February 2, 2005 to the point that he could not move without experiencing severe pain.

Appellant submitted a February 7, 2005 note from Dr. Dhanda who stated that appellant was under his care for left shoulder tendinitis and low back pain and indicated that his absence from work between February 2 and 7, 2005 was medically advised. In a report dated March 16, 2005, Dr. James Kayvander, an attending Board-certified orthopedic surgeon, indicated that appellant could not return to work for four weeks or longer. Dr. Kayvander recommended that he undergo physical therapy and epidural injections for his low back stenosis and herniated nucleus pulposus and that he undergo surgery for his left shoulder.

On March 23 and 30, 2005 appellant underwent lumbar epidural steroid injections and bilateral lumbar facet joint injections. The record contains the findings of magnetic resonance imaging testing, which showed that he had degenerative disease of his left shoulder and back at L4-5.²

² The record also includes a February 2, 2005 report in which Dr. Robert L. Hook, an attending physician Board-certified in emergency medicine, indicated that appellant reported "getting in and out of a lower car than normal for about a week" and experienced worsening back pain. Dr. Hook also indicated that appellant reported throwing a bag over his shoulder at work on February 2, 2002 and experiencing worsening pain in his left back and down into his left leg.

By decision dated May 2, 2005, the Office denied appellant's claim that he sustained employment-related injuries to his left shoulder and back. The Office indicated that appellant had not shown that the claimed condition was related to accepted employment factors.

By appeal request form dated June 7, 2005 and postmarked June 8, 2005, appellant requested a hearing before an Office hearing representative.

By decision dated June 29, 2005, the Office denied appellant's request for a hearing under section 8124 of the Act. The Office stated that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue could be resolved by submitting additional evidence to establish that the claimed injuries were causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act³ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵ For either a traumatic injury or an occupational disease, the claimant must submit a factual statement identifying the employment activity or activities implicated as causing or contributing to the claimed condition.⁶

ANALYSIS -- ISSUE 1

In February 2005, appellant filed an occupational disease claim alleging that he sustained employment-related left shoulder and lower back injuries, which he attributed to "working out of and on company vehicle and product." In an attached statement, he indicated that on about January 3 or 4, 2005 he "pulled/strained left shoulder" and that on about January 11, 2005 he "pulled muscle/pinched nerve in lower back."⁷ Although appellant identified the area in which

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas occupational disease refers to injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. §§ 10.5(a)(15), (16); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

⁶ The claimant must also establish that the implicated incident or incidents occurred at the time, place and in the manner alleged. See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989); *Julie B. Hawkins*, 38 ECAB 393, 396 (1987).

⁷ It should be noted that, although appellant used an occupational disease claim form, it appears that he intended to allege two separate traumatic injuries, one to the left shoulder and one to the back.

he was working as well as the types of injuries he believed he sustained, he did not provide any description of the specific employment duties, activities or conditions he felt caused or contributed to his injuries.

By letter dated March 2, 2005, the Office requested that appellant submit additional evidence, including a statement which clarified the particular employment activities or conditions he felt caused or contributed to his claimed injuries. He submitted a March 16, 2005 statement in which he stated that on January 3 or 4, 2005 he strained his left shoulder, that on January 12, 2005 he strained his lower back at work and that on February 2, 2005 his back “went out.” Although appellant again identified the type of injuries he felt he sustained, he still did not provide any indication of what specific employment activities or conditions he believed caused or contributed to these claimed injuries.⁸ As noted above, it is appellant’s responsibility to establish the essential elements of his claim, including the factual component which involves identifying the particular employment factors which are alleged to have caused injury. Despite being provided with an opportunity to do so, appellant failed to establish this factual component of his claim.

For these reasons, appellant has not submitted a statement identifying the specific employment activities or conditions implicated as causing or contributing to the claimed condition. Therefore, he has not met his burden of proof to establish that that he sustained an employment-related left shoulder or back injury.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant’s entitlement to a hearing before an Office representative, provides in pertinent part: “Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹¹

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal

⁸ The record contains a February 15, 2005 report in which Dr. Dhanda, an attending Board-certified internist, listed the date of injury as approximately January 10, 2005 and the mechanism of injury as “lifting -- twisting out of nonreg[ulation] vehicle.” The record also includes a February 2, 2005 report in which Dr. Hook, an attending physician Board-certified in emergency medicine, indicated that appellant reported experiencing pain “getting in and out of a lower car than normal for about a week” and throwing a bag over his shoulder at work on February 2, 2002. These reports only provide further uncertainty about which employment activities or conditions appellant felt caused or contributed to his claimed injuries.

⁹ Because appellant did not identify the employment activities or conditions believed to have caused his claimed injuries, it is not necessary for the Board to consider the medical evidence of record.

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹² Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,¹³ when the request is made after the 30-day period for requesting a hearing,¹⁴ and when the request is for a second hearing on the same issue.¹⁵

ANALYSIS -- ISSUE 2

Appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated May 2, 2005 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a document dated June 7, 2005 and postmarked June 8, 2005. Hence, the Office was correct in stating in its June 29, 2005 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's May 2, 2005 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its May 2, 2005 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that the claimed injuries were causally related to factors of employment. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹⁶ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related left shoulder or back injury. The Board further finds that appellant Office properly denied appellant's request for a hearing under section 8124 of the Act.

¹² *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹³ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁴ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁵ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹⁶ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 29 and May 2, 2005 decisions are affirmed.

Issued: October 18, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board